80-861

Supreme Court, U.S.
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No. ———

Supreme Court of the United States

OCTOBER TERM, 1980

HAROLD E. BAGNALL, et al.,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION

DAVID T. BRYANT
National Right To Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel For The Petitioners

REX H. REED
National Right To Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Of Counsel

FANNON PRINTING CENTER, ALEXANDRIA, VIRGINIA 22302 (703) 998-6011

QUESTIONS PRESENTED FOR REVIEW

I. Does Section 2, Eleventh, of the Railway Labor Act, Permit an Employer and the Exclusive Representative of a Craft or Class of Employees to Require, as a Condition of Employment, that Non-members of the Representative Pay Agency Fees Based Upon a Percentage of Salary, Resulting in Unequal Amounts of Fees Between Individual Employees?

II. Under Section 2, Eleventh, of the Railway Labor Act, When a Non-Union Member Notifies His Exclusive Representative that He Objects to the Use of His Agency Fees for Purposes Other Than Collective Bargaining, Contract Administration and Grievance Processing and the Representative Makes Expenditures for Such Other Purposes, May the Employer and the Exclusive Representative Require the Employee, as a Condition of Employment, to Pay Agency Fees in Excess of the Dues Paid by the Member Who Pays the Lowest Dollar Amount of Dues?

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No. ———

Supreme Court of the United States

OCTOBER TERM, 1980

HAROLD E. BAGNALL, et al.,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION

The Petitioners pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 30, 1980.

PARTIES TO THE PROCEEDING

The Petitioners are Harold E. Bagnall, Donald Bauer, Richard L. Berry, Kraig A. Hilbink, Roy A. C. Hill, R. T. Kirchoff, Thomas D. Klemens, David LeBoutillier, R. D. Longwish, Robert G. Maiers, Floyd E. Murray, William W. Niendorff, Allan G. Sawatsky, Clyde B. Smith and N. J. Vasilaros.

The Respondents are the Air Line Pilots Association, International; Braniff Airways, Inc.; Northwest Airlines, Inc.; and Trans World Airlines, Inc.

REPORT OF OPINION BELOW

The opinion of the Court Of Appeals is reported at 626 F.2d 336.

STATEMENT OF JURISDICTION

The Opinion Of The Court Of Appeals was published on June 30, 1980. Respondent Air Line Pilots Association, International's petition for rehearing and suggestion for rehearing en banc was denied on September 3, 1980. This Petition For A Writ Of Certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Railway Labor Act, Section 2, Eleventh (a), 45 U.S.C. § 152, Eleventh (a):

> Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become mem-

bers of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

The Petitioners are pilots employed [1] by the Respondent airlines. Labor-management relations of such airlines are governed by the Railway Labor Act (RLA), 45 U.S.C. § 151, et seq. The Respondent, Air Line Pilots Association International (ALPA), is the Petitioners' exclusive representative as authorized by the RLA section 2, Third, Fourth and Ninth, 45 U.S.C. § 152 Third, Fourth and Ninth. In performing its duties as exclusive representative, ALPA has negotiated agreements with the Respondent airlines which govern the Petitioners' wages, hours, and other terms and conditions of employment. Each of these agreements contains an "agency shop" provision which requires nonmembers of ALPA to pay it as a condition of employment a service fee equal to monthly dues paid by members. Monthly dues are equal to 1.35% of salary. The Petitioners are not members of ALPA. The yearly dues paid to ALPA by members varies from about $250.00 ($18,500 salary) to at least as much

[1] Petitioner Hill retired upon reaching age 60 in December 1979.

as $1,080.00 ($80,000 salary). ALPA uses the dues and service fees it collects for purposes other than collective bargaining, contract administration and grievance processing.

Petitioners filed their complaint in the District Court in three counts. Count I alleged that nonmembers lawfully could not be required under the RLA to pay fees based upon a percentage of salary; and Count III notified ALPA that Petitioners objected to the use of their fees for any purpose other than collective bargaining, contract administration and grievance processing; alleged that ALPA used their fees for such other purposes and further alleged that, under these circumstances, they could not lawfully be charged fees in excess of the dues paid by the member who paid the lowest amount of dues. Count II, which involves a claim that ALPA lawfully cannot collect a finance charge from the Petitioners, was decided by the Court of Appeals in favor of the Petitioners and it is not involved in this Petition.

ALPA filed a motion to dismiss or, in the alternative, for summary judgment. The respondent airlines also filed motions for summary judgment. The motions for summary judgment were granted by the District Court and this action was affirmed by the Court of Appeals for the Fourth Circuit.

BASIS FOR DISTRICT COURT JURISDICTION

Jurisdiction in the District Court was based upon 28 U.S.C. § 1337, federal question jurisdiction.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS PRESENTED INVOLVE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case involves the extent to which dissenting employees may be required to financially support an exclusive collective bargaining representative under federal labor laws. The case arises under section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh; but, the similarity of that section to the first proviso to section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), means that a construction of one statute will result in the establishment of the rule applicable under both statutes. While the case presents questions of statutory construction, such questions have constitutional overtones.

ALPA's dues are set at 1.35% of a pilot's salary. Under this system an experienced captain on heavy equipment may pay as much as $1,080.00 a year in dues whereas a junior third officer or flight engineer may pay as little as $250.00 a year. The difference is $830.00 which these two employees pay for the same thing—representation in the same unit under the same collective bargaining agreement. No one questions the right of ALPA to structure its dues in this fashion if the voluntary union members agree to do so. Rather, the first question presented is whether section 2, Eleventh (a) permits a structure like that above to be imposed upon those who elect, as is their right, not to join and become a member of their exclusive representative. The statutory language permits nonmembers to be required to financially support their exclusive representative to the extent of the "dues—uniformly required as a condition of acquiring or retaining membership."

As made clear by this Court in *International Ass'n of Machinists* v. *Street,* 367 U.S. 740, 762-64 (1961), this statute was passed to eliminate "free riders"—those who are represented by the union but who would otherwise refuse to share in the cost of such representation. A necessary corollary to this justification for the statute is that *any member,* by definition, cannot be a free rider. Thus, if *any nonmember* is required to pay the same amount as the lowest paying member, he is no longer a free rider and the purpose of the statute is satisfied.

But, here, the percentage arrangement results in the nonmember being required to pay four or five times as much as a member. Such a result was never intended by Congress when it enacted the statute. The statute says "uniformly required for *membership.*" "Membership" insofar as it is applicable to these plaintiffs is a singular thing. There are no classifications or different types of membership. If A has to pay more dues than B for the same privilege or status—membership, the only dues *uniformly required* of members is the lesser amount paid by B.

This question is of considerable importance because it deals with the rights of dissenters—those in the minority who have chosen not to join and become members of the representative selected by the majority. This Court has never considered the question, but it should pass upon it because of its importance to the proper administration of not only the Railway Labor Act but also the National Labor Relations Act. The Court below is the only Court of Appeals that has considered the question under the Railway Labor Act. *But see, Schwartz* v. *Associated Musicians of Greater N.Y., Local 802,* 340 F.2d 228 (2d Cir. 1964). The National Labor Relations Board has held that dues

based upon a percentage of salary are permissible under the National Labor Relations Act. *Stage Employees & Motion Picture Operators Union,* 140 N.L.R.B. 759 (1963); *Aluminum Workers Trade Council,* 185 N.L.R.B. 69, 70 (1970). However, a perusal of these decisions will show that they are based on *ipse dixit* rather than logical consideration of the purposes and the history of the Act.

Where, as here, there is but a single type and category of membership involved, dues based upon a percentage of salary cannot be "uniform" within the meaning of the statute.

II. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In addition to the statutory argument, the Plaintiffs alleged in their complaint that they objected to ALPA's use of their fees for any purposes other than collective bargaining, contract administration and grievance processing. The amount of ALPA's expenditures for such other purposes was not litigated; rather it was settled by refunds from ALPA, accepted by the Plaintiffs, of a portion of their previously paid fees. Nevertheless, these facts bring the Plaintiffs squarely within the ambit of the rules announced by this Court in *Int'l Ass'n of Machinists* v. *Street, supra,* and *Brotherhood of Ry. Clerks* v. *Allen,* 373 U.S. 113 (1963). Those cases and *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn,* 373 U.S. 746 (1963), and *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977), require the conclusion that the decision below results in an unconstitutional invasion of the First Amendment rights of the Petitioners.

This Court first considered the constitutionality of the RLA in *Railway Employees Dept.* v. *Hanson,* 351 U.S. 225 (1956). The Court sustained the facial validity of the statute. In doing so, it stated at 238:

> On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.' If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.

As might be expected, it was not long before a record presenting the reserved issue was before the Court. This was *Int'l Ass'n of Machinists* v. *Street, supra.* In order to avoid the constitutional issue, the Court construed the statute as preventing the use by the union of the proportion of a dissenter's dues which would otherwise have been spent for political purposes. While

not prescribing any, the Court offered the following suggestions as to remedies in such cases at 774-75:

> One remedy would be an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget. The union should not be in a position to make up such sum from money paid by a nondissenter, for this would shift a disproportionate share of the costs of collective bargaining to the dissenter and have the same effect of applying his money to support such political activities. A second remedy would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed. There should be no necessity, however, for the employee to trace his money up to and including expenditures; if the money goes into general funds and no separate accounts of receipts and expenditures of the funds of individual employees are maintained, the portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.

Thus, the Court made it clear that a union could not segregate fees received from dissenters and use them only for collective bargaining purposes "for, this would shift a disproportionate share of the costs of collective bargaining to the dissenter and have the same effect of applying his money to support such

political activity." *See also, Retail Clerks Int'l Ass'n* v. *Schermerhorn, supra,* at 753-54.

This Court again considered the issue in *Brotherhood of Ry. Clerks* v. *Allen, supra.* There the Court refined its suggestions as to possible remedies as follows at 122-24:

> Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. And no decree would be proper which appeared likely to infringe the union's right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities.
>
> *Fourth.* While adhering to the principles governing remedy which we announced in *Street,* see 367 U.S. at 771-775, 81 S. Ct. at 1801-1803, 6 L. Ed. 2d 1141, we think it appropriate to suggest, in addition, a practical decree to which each respondent proving his right to relief would be entitled. Such a decree would order (1) the refund to him of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion. We recognize that practical difficulties may attend a decree reducing an employee's obligations under the union-shop agreement by a fixed proportion, since the proportion of the union budget devoted to political activities may not be constant. The difficulties in judicially administering relief, al-

> though not insurmountable (a decree once entered would, of course, be modifiable upon a showing of changed circumstances), should, we think, encourage petitioner unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy.
>
> There is precedent for such a plan. If a union agreed upon a formula for ascertaining the proportion of political expenditures in its budget, and made available a simple procedure for allowing dissenters to be excused from having to pay this proportion of moneys due from them under the union-shop agreement, prolonged and expensive litigation might well be averted.

A more recent decision of the Court also sheds light on this issue. *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977). It is a public sector case but the Court makes it plain that, in the case of dissenters, the principles applicable in the private and public sectors are the same. *See,* 431 U.S. at 224. In *Abood,* the Court clarifies its prior holdings in *Street* and *Allen* by making it clear that dissenters may be required to share in three general categories of expenses only. These are collective bargaining, contract administration and grievance processing. *See,* 431 U.S. at 225-26 and 231.

In determining who is and who isn't a "free rider" and what is or isn't a "fair share" to pay for representation, the focus of attention should not be on the salary received but rather on the services for which Congress intended the "free rider" to pay. As interpreted by the Supreme Court in the cases discussed above, those services are the costs of negotiating the contract, the costs of administering that contract and

the costs of processing grievances arising under that contract. These and only these are the benefits which the bargaining agent provides to nonmembers and it costs the bargaining agent equally as much for the lowest paid as it does for the highest paid employee. Nevertheless, ALPA has chosen to structure dues for its members on a percentage of salary. The collective bargaining agreement requires nonmembers to pay fees equal to the dues they would pay if they were members. Obviously, the higher paid nonmember is required to pay more dollars than the lower paid member. But, having made their objections known, these nonmembers cannot constitutionally be required to pay more than the lowest paid member pays. Otherwise, the nonmember would be required to subsidize costs which should be borne by the members in violation of the holdings in *Street, Allen, Schermerhorn* and *Abood.*

At first blush, it would seem that a possible remedy would be to determine those costs which can be charged to dissenters, divide that by the total number of members and nonmembers, and charge each nonmember with that amount. Indeed, this would be proper if the amount so determined was equal to or less than the minimum dues paid by a member, but, such a solution is not legally permissible when the amount exceeds the minimum dues. Section 2, Fourth of the RLA provides in part:

> No carrier, its officers, or agents shall . . . influence or coerce employees in an effort to induce them to join or remain members of any labor organization . . .

The arrangement above would certainly influence the lower-paid nonmember to join because his dues would

be less than the fee. The arrangement would also influence the higher paid nonmember not to join because his dues would be more than the fee. At least to this extent, Section 2, Fourth was not amended by Section 2, Eleventh.

The only constitutional relief for the Petitioners is to reduce their fees to the minimum dues paid by a member. By doing so, they would neither be free riders nor would they be allowing members to ride free. Under the circumstances, this is the only conceivable result which is in accord with Congress' purpose in enacting the statute.

From the above it is apparent that the judgement of the Court of Appeals is contrary to the prior decisions of this Court because it results in the invasion of protected First Amendment rights of the Petitioners.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID T. BRYANT
National Right To Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel For The Petitioners

REX H. REED
National Right To Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1773

HAROLD E. BAGNALL, DONALD BAUER, KRAIG A. HILBINK, ROY A. C. HILL, R. T. KIRCHOFF, THOMAS D. KLEMENS, DAVID LEBOUTILLIER, R. D. LONGWISH, ROBERT G. MAIERS, WILLIAM W. NEINDORFF, N. J. VASILAROS, RICHARD L. BERRY, ALLAN G. SAWATZKY, CLYDE B. SMITH, *Appellants,*

v.

AIR LINE PILOTS ASSOCIATION, INT'L, TRANS WORLD AIRLINES, INC., NORTHWEST AIRLINES, INC., BRANIFF INTERNATIONAL CORP., *Appellees.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria
Albert V. Bryan, Jr., District Judge

ARGUED JUNE 7, 1979 DECIDED JUNE 30, 1980

Before HAYNSWORTH, Chief Judge, and WINTER and WIDENER, Circuit Judges.

David T. Bryant (Rex H. Reed, National Right To Work Legal Defense Foundation, on brief) for Appellants; Gary Green for Appellees.

WIDENER, Circuit Judge:

Plaintiffs in these consolidated actions are fifteen airline pilots who sued their respective employers and the Air Lines Pilots Association (ALPA), their exclusive bargaining representative, to obtain a declaratory judgment, an injunction and monetary relief based upon their contentions (a) that they are illegally being required to pay membership dues to ALPA based upon a percentage of their earnings, (b) that ALPA illegally exacts a finance charge

from all members of the bargaining unit who elect not to pay membership dues annually in advance or monthly by means of an automatic payroll deduction, and (c) that ALPA, over plaintiffs' objection, has spent a part of the membership dues it has collected for purposes other than the costs of collective bargaining, contract administration, and grievance processing, and plaintiffs are entitled to recover this portion of what they have paid.[1] The district court granted summary judgment for defendants. We affirm in part and reverse in part.

I.

The facts may be briefly stated: Plaintiffs are variously employees of Trans World Airlines (TWA), Northwest Airlines (Northwest), and Braniff International Corporation (Braniff). Plaintiffs are not members of ALPA.

ALPA has negotiated successive collective bargaining agreements with TWA, Northwest and Braniff, governing the wages, hours and working conditions of pilots employed by them irrespective of whether the pilots are members of ALPA or not. The current agreements require all pilots to become and remain members of ALPA, or, in lieu thereof, to pay an agency shop service charge equivalent to the dues normally required of members.

ALPA's constitution and by-laws provide that annual dues are due and payable by January 1 of each year. They are fixed at the rate of 1.35% of each covered employee's estimated airline income for the calendar year. If there is a variance between estimated and actual income, ALPA's treasurer makes an appropriate adjustment. Dues may be paid also by a monthly check-off through a member's employer where his employment agreement permits a check-

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[1] Since the decision in the district court, the parties have settled this aspect of plaintiffs' suit, and thus it is moot. We do not consider it on appeal.

off,[2] or they may be paid monthly directly to ALPA under ALPA's finance plan.[3] The latter opinion is a recent innovation. Prior to 1970, some members borrowed from a commercial bank to pay their annual dues on January 1 and repaid their bank loan, with a finance charge, over the course of the year. ALPA guaranteed such loans so that the bank gave a favorable interest rate. In 1970, after ALPA had acquired a computer and developed an appropriate internal billing system, it concluded to eliminate outside lenders and to handle the financing and collection of dues itself. It therefore created the option and fixed the finance charge at 1% per month on the unpaid balance.

II.

Plaintiffs' contention that they are illegally being required to pay membership dues to ALPA based upon a percentage of their earnings is grounded on § 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, as made applicable to airline pilots by 45 U.S.C. § 181. Section 152, Eleventh (a), permits an employer and a union to make closed-shop agreements with the limitation that:

> [N]o such agreement shall require such condition of employment [i.e., membership in the union] . . . with respect to employees to whom membership was denied

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[2] All three employment agreements involved in this case contain check-off provisions which are available, but are not mandatory, to both members and non-members of ALPA. The employment agreements in these cases do not permit the dues or service charge to be paid in a lump sum, annually, in advance. Neither do they forbid it. The subject is simply not mentioned. The record does not reflect whether ALPA would accept a lump sum payment if one were tendered.

[3] None of the employment agreements involved here contain any provision for the payment of dues through this finance plan. Indeed, they mention no method of payment except payroll check-off which is optional with each pilot.

> or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) *uniformly required* as a condition of acquiring or retaining membership. (Emphasis added.)

The language of § 152, Eleventh (a), is similar to § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158 (a)(3).[4] The purpose of enacting § 152, Eleventh, was to require non-union members who benefit from the collective bargaining conducted by the union to share equally with members the responsibilities incident to membership, i.e., to share equally in the expense of operating the union. *See generally* Legislative History of the Railway Labor Act, As Amended, 93d Cong. 2d Sess., 1970, pp. 1129, 1166, 1249-50, 1969.

Plaintiffs assert that membership dues based upon a percentage of earnings lack uniformity, and hence the requirement of "uniformity" contained in § 152, Eleventh (a), is not satisfied. To illustrate their argument, plaintiffs posit that a pilot earning $20,000 per year whose dues or agency shop service charge is computed at 1.35% of his earnings pays less than a pilot earning $35,000 per year whose dues or equivalent is computed at the same rate. Therefore, they assert, a disproportionate share of the

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[4] Section 158(a)(3) makes it an unfair labor practice for an employer to discriminate against an employee with respect to hire, tenure or any term or condition of employment to encourage or discourage membership in a labor organization. The section permits an employer to enter into a closed-shop agreement but specifies that an employer may not discriminate against an employee for non-membership in a labor organization:

> (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees *uniformly required* as a condition of acquiring or retaining membership . . . (emphasis added).

cost of operating the union is placed upon the latter, all in violation of the language and purpose of the statute.

We do not agree. First, we note that the statute prescribes "uniformity" and not "equality." In essence, plaintiffs are arguing that the cost of operating the Union must be borne equally on a per capita basis. But this is not the law. In dealing with §8(a)(3) of the National Labor Relations Act, which also prescribes the test of uniformity, the National Labor Relations Board has said:

> [A] labor organization . . . may lawfully charge, as a condition of acquiring or retaining membership, different rates for initiation fees and dues provided that they are based on a reasonable general classification; that is, one that is not discriminatory. Thus, dues based on the employees' earnings have been held to be not discriminatory.

Aluminum Workers Trade Council, 185 NLRB, 69, 70 (1970) (citing Stage Employees & Motion Picture Operators Union, 140 NLRB 759 (1963)).

The assessment of dues based upon a percentage of earnings is, we think, a reasonable classification. Considering either his economic ability to pay or the benefits he realizes from effective representation, a pilot earning greater income has an advantage over a pilot earning less; there are reasons why he should or could pay more. There is uniformity in the basis of computing dues and there is lack of any indication of discrimination. Even if it is true, as plaintiffs suggest but do not prove, that non-members of ALPA earn more than members, there is no claim that ALPA adopted the percentage formula for discriminatory purposes.

Our view that dues based upon a percentage of earnings comports with the language and intent of § 152, Eleventh (a), is confirmed by Schwartz v. Associated Musicians of

Greater N.Y., Local 802, 340 F2d 228 (2d Cir. 1964). That case arose under the Labor Management Relations Act and the Labor Management Reporting and Disclosure Act, and it concerned a union's "local tax" of 1½% upon sidemen on all engagements. The question was whether the tax was membership dues within the meaning of the Labor Management Relations Act and its provisions restricting payments to employee representatives. In answering affirmatively the court said:

> [W]e can discern no practical or logical reason for holding that "membership dues" do not embrace the percentage levy exacted by the Local. The tax was similar to membership dues in that it applied equally to all members of the Union who secured employment as sidemen. The fact that payment was contingent upon employment did not mean that the tax was an irregular assessment that could not qualify as dues. . . . 340 F2d at 234.

Thus, impliedly, the assessment of dues by a formula fixing the amount at a percentage of earnings was approved.

The authorities cited by plaintiffs do not persuade us to a contrary view. The decisions of the National Labor Relations Board on which plaintiffs rely all involved discrimination or lack of uniformity quite different from the disparity in the amount of dues paid by employees in the instant case as a result of the application of a uniform percentage factor. In short, these cases involved general classifications that were not reasonable. For example, in Electric Auto-Lite Co., 92 NLRB 1073 (1950), *enforced*, 196 F2d 500 (6 Cir. 1952), the amount of dues payable was dependent upon whether a member attended union meetings. *See also* NLRB v. Leece-Neville Co., 330 F2d 242 (6 Cir. 1964). Ferro Stamping & Mfg. Co., 93 NLRB 1459 (1951); Local 153, Int'l Union, 99 NLRB 1419 (1952); Food Machinery & Chemical Corp., 99 NLRB 1430 (1952);

and Brewery Workers, Local 102, 116 NLRB 178 (1956), all concerned questions of whether it was discriminatory to charge old employees a higher initiation fee than new employees, or whether a first-time applicant for union membership can be charged a lesser amount than that charged a former member for reinstatement. A holding that some of these forms of discrimination were illegal provides no guidance for proper resolution of the issue that the instant case presents.

Similarly, we do not think that the holding in International Association of Machinists v. Street, 367 U.S. 740 (1961), and its progeny barring the union's use of an employee's funds to support political causes which the employee opposes is of aid here now that that aspect of the instant case has been settled by partial refunds of dues by ALPA to plaintiffs. More significantly, *Street* held that while an employee may be entitled to an injunction against future like conduct and restitution of that portion of his funds which were illegally spent, the employee is not altogether relieved of his obligation to pay union dues. 367 U.S. at 771.

III.

Under 45 U.S.C. § 152, Eleventh (a), any dues assessed not only must be "uniform" but also must be "periodic" and exclude "fines and penalties." Plaintiffs contend that the 1% finance charge levied on the unpaid balance of the monthly dues of those employees who choose to participate in the ALPA finance plan constitutes a penalty which is neither uniform nor periodic.

We do not directly consider whether this finance charge is authorized under the Act because the collective bargaining agreements in question do not authorize, and certainly do not require, the payment of dues through the ALPA finance plan.

A review of the collective bargaining agreements in question shows that all three authorize the payment of a service charge by non-members equal to the regular monthly dues. The collective bargaining agreement between ALPA and Braniff provides that each working pilot who does not voluntarily join the union must pay the ALPA a monthly service charge. That service charge "for the first month shall be an amount equal to the Association's regular and usual initiation fees and monthly dues, and for each month thereafter in an amount equal to the regular and usual monthly dues. . . ." The TWA agreement provides that non-member pilots shall pay a service charge which "for the first month and for each month thereafter shall be in an amount equal to the Association's regular and usual monthly dues uniformly required of the members of the Association. Except as provided in Section 3C [checkoff], payment shall be made on the fifteenth day of the month for which such service charge is payable. . . ." The Northwest agreement likewise provides for the payment of a service charge by non-member pilots. There, such a service charge shall be "a monthly amount equal to the Association's regular and usual monthly dues which would be required to be paid by such employees if a member, . . ."

None of these agreements, however, contain a provision for the ALPA finance plan. That plan is established by the ALPA Constitution and Bylaws. There, the ALPA establishes the three methods of payment—monthly checkoff, annual payment in advance, and monthly payment to the association under its finance plan. Thus, ALPA has established a three option payment plan for those bound by its constitution and bylaws.

The plaintiffs are not members of the ALPA and therefore are not bound by the terms of its constitution and bylaws. While non-member pilots are bound to the terms and provisions of collective bargaining agreements, even though they do not belong to the union that negotiated the

agreement, the union, however, cannot go a step further and bind those non-members to the union's own constitution and bylaws, not set out in the collective bargaining agreement. None of the collective bargaining agreements themselves authorize the exaction of annual dues, with an imposition of an interest charge if paid on a monthly basis. Therefore, such collection of annual, as opposed to monthly, dues from non-members of the union is unauthorized by these contracts.

These plaintiffs chose not to be members of the ALPA, and therefore should not be bound by its internal constitution and bylaws. We decline to read the terms of the ALPA's constitution and bylaws into the words "service charge" of the collective bargaining agreements. The collective bargaining agreements did not provide for payment of an amount equal to the amount a union member pays and paid by the method he pays. Rather, they provide for the payment of a "service charge" "in an amount equal to the regular and usual monthly dues." So long as the non-member pilot pays to the union the monthly requirement, whether by way of payroll check-off or otherwise, it is a matter of indifference how he comes by the money or the method of payment. The union is entitled to its monthly stipend, to be sure, but no more. Nothing in the collective bargaining agreement gives the union the right to regulate a non-member's method of payment. The non-member may not be required by the union to utilize the ALPA finance plan, thus the union may exact no penalty of non-members on this account nor collect a finance charge of them by compulsion. Accordingly, the only obligation of the non-member being to pay, the requirements of 45 U.S.C. § 152, Eleventh (a), are met in that the "periodic" monthly payments of a service charge equal to the dues of a member do not include "fines" or "penalties" for the union may not exact a finance charge under the terms of the collective bargaining agreement.

IV.

We find no merit in ALPA's contention that plaintiffs have failed to exhaust their contractual or statutory remedies before litigating the validity of the charges in question.

Under the collective bargaining agreements in question, a pilot who has been discharged or threatened with discharge because of a delinquency in the payment of dues or service charges may request review of that decision.[5] Such review could ultimately entitle the pilot to a hearing before a neutral arbitrator chosen by the National Mediation Board. The decision of the arbitrator would be final and binding on all parties. During the pendency of a decision, discharge could not be completed.

We believe that such a remedy is tantamount to no remedy at all. The record does not show any contractual obligation in the collective bargaining agreements or otherwise to arbitrate any question as to the amount of dues other than incident to discharge. A pilot's only recourse in challenging the amount of dues owed would be to stop paying his dues until the Association requested that he be discharged or until he is discharged. At that point he could seek review under his collective bargaining agreement. If, however, he was not successful there, he would be discharged from employment. He would not have an opportunity to repay his delinquent dues which he had to incur in order to start the arbitration process in the first place. We do not consider such an alternative an effective remedy that would bar consideration of plaintiffs' claims. In all events, there is no obligation to arbitrate unless

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[5] No arbitration procedure can be initiated before either a threat of discharge or discharge itself has occurred. Both the Northwest agreement and the Braniff agreement provide such procedure for employees who are discharged because of delinquency in payment of dues. Under the TWA agreement, the procedure is available to those employees whose discharge has been requested by the union.

provided by contract. Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962), overruled on other grounds.

Defendants also assert that the plaintiffs are not entitled to relief because they have not brought their complaint to the Adjustment Board pursuant to the Railway Labor Act. It is well settled, however, that the Adjustment Board does not have jurisdiction to arbitrate disputes between an employee and his union representative.[6] The language of § 3, 45 U.S.C. § 153, is subject to no other interpretation.[7] It is likewise clear that federal courts have jurisdiction to decide disputes between employees and their union representatives where the union has been charged with violating its duty of fair representation.[8] Such is the case here. The only remaining question is whether the fact that the employer airlines are also defendants in this suit would deprive this court of jurisdiction to decide the issues here. We do not think so.

In Conley v. Gibson, 355 U.S. 41 (1957), the Supreme Court held that the federal courts were the proper forum for employee suits against their union for violation of its duty of fair representation. There, the employer railroad was not a party. The Court reasoned, however, that if it became necessary, the railroad could be joined as a party. 355 U.S. at 45.

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[6] Czorsek v. O'Mara, 397 U.S. 25 (1970); Conley v. Gibson, 355 U.S. 41 (1957); Rumbaugh v. Winifrede Railroad Co., 331 F2d 530 (4th Cir. 1964); Jones v. Trans World Airlines, 495 F2d 790 (2d Cir. 1974).

[7] 45 U.S.C.A. § 153 First (i) states that the Adjustment Board has jurisdiction over "[t]he disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . ."

[8] Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944); Czorsek v. O'Mara, 397 U.S. 25 (1970); Conley v. Gibson, 355 U.S. 41 (1957).

The Court concluded in Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324 (1968), that federal courts have jurisdiction over disputes that are essentially between employees and their union. There, a group of 13 employees had sued their union representative and the carrier, alleging claims of racial discrimination. Once again, the Court noted that the railroad adjustment board has exclusive jurisdiction to interpret the meaning of the terms of collective bargaining agreements.[9] But the Court further held that, while § 3 First (i), 45 U.S.C. § 153 First (i), by its own terms applies only to disputes between an employee or group of employees and their employer, federal courts do not lose their jurisdiction simply because the employer carrier is included in the lawsuit if the dispute is essentially one between employees on the one hand and the union and the employer together on the other.

In Czorsek v. O'Mara, 397 U.S. 25, 28 (1970), the Court again reaffirmed the holdings of *Conley* and *Glover*, noting that such a civil suit is "not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts."

This circuit has dealt with this question in Rumbaugh v. Winifrede Railroad Co., 331 F2d 530 (4th Cir. 1964). There, the plaintiff employee sued the railroad and his union representative alleging that the union had discriminated against him by refusing him membership, by failing to protect his employment rights and by having him wrongfully discharged. This court, adhering to the position of the Supreme Court in *Conley* restated that "the Adjustment Board does not have exclusive, or even concurrent, jurisdiction over suits by an employee against the bargaining agent to redress discriminatory treatment." Id at 536.

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[9] See Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972).

Quoting with approval Cunningham v. Erie Railroad, 266 F2d 411, 416 (2d Cir. 1959), the court further stated:

> "If the District Court has jurisdiction to proceed against the union it is clear, we think, that it has also power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments." 331 F2d at 537.

Concluding that the controversy was primarily between the union and the employee and that the railroad was at best only incidentally a party to the action, the court ruled that jurisdiction did rest with the federal courts.

In *Rumbaugh,* defendant railroad also claimed that jurisdiction did not exist because interpretation of the collective bargaining agreement would likely be necessary for full resolution of the controversy. The court rejected that argument and further noted that the court was obligated to interpret the agreement. Without a federal forum to turn to, those plaintiffs would have had no other place to seek any sort of relief.

Citing *Rumbaugh,* in a case much like this one, concerning union dues, the Third Circuit held, in Brady v. Trans World Airlines, 401 F2d 87 (3rd Cir. 1968), that it had jurisdiction to consider plaintiff employee's suit against the union and the airline employer, even after the plaintiff had sought and was denied relief by the Adjustment Board. The employee there sued for violation of the union's duty of fair representation and violation of § 2, Eleventh, of the Act by his discharge from employment. A dispute had developed as to the exact amount of union dues plaintiff was required to pay, with the union contending that it had raised the dues while plaintiff claimed that the union did not follow correct procedure necessary to raise the amount. Plaintiff was eventually discharged by TWA at the union's request. In deciding the jurisdiction question, the court concluded:

> That the employer was joined to afford complete relief and that the dispute may incidentally involve con-

> struction or interpretation of the collective bargaining agreement does not change the basic fact that the Railway Labor Act does not authorize adjustment boards to hear an employee's dispute against his union.

Id at 93.

Here, the plaintiffs allege that ALPA has a duty to represent fairly both members and non-members within the bargaining unit. As non-members, they charge that they are being overcharged for dues and thus treated discriminatorily. Further, they claim that the amount of service charge and finance charge collected by the union from non-members violate § 2, Eleventh, of the Act, 45 U.S.C. § 152, Eleventh. We think jurisdiction over these claims has been properly alleged under 28 U.S.C. § 1337. We reject defendants' claim that these plaintiffs must exhaust their administrative remedies under the Act before bringing action in federal court.

Accordingly, we affirm that part of the judgment of the district court which approves the setting of a service charge (equal to union dues) as a percentage (1.35%) of pay. We reverse that part of the judgment of the district court which permits the union to require that non-members of the union pay their service charge (equal to dues) only by one of the same methods union members have subjected themselves to by their constitution and bylaws. On remand, the district court will enter its order enjoining the union from requiring the collection of the service charge from non-members by any particular method, specifically including, but not exclusively, the ALPA finance plan.

Each side in this appeal will bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.*

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* The suits were dismissed against the carriers, and they seem to have been forgotten in the appeal by all sides. The real dispute, of course, is between the plaintiffs and the union.

WINTER, Circuit Judge, concurring and dissenting:

For the reasons that it assigns, I agree with the majority that § 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, as made applicable to airline pilots by 45 U.S.C. § 181, does not render illegal the assessment of membership dues to ALPA by a formula based upon a percentage of their earnings. I disagree, however, that the 1% monthly finance charge levied on the unpaid balance of the monthly dues of those employees who choose to participate in the ALPA finance plan is not to be paid by non-members of ALPA who are covered by the several bargaining agreements. To that extent I respectfully dissent. Further, I do not think that the finance charge runs afoul of the statute because it constitutes a penalty. Certainly also, the finance charge is "periodic" and "uniform", as the statute requires.[1] Under my view of the case, I would not reach any question of the failure to exhaust contractual or statutory remedies.

The collective bargaining agreements all require the payment of a service charge by non-members of ALPA equal to the regular monthly dues. It is true, as the majority asserts, that the collective bargaining agreements do not authorize the exaction of annual dues with an imposition of an interest charge if paid on a monthly basis. But, the collective bargaining agreements by requiring a service charge equal to the regular monthly dues make, in effect, ALPA's constitution and bylaws with respect to the amount of dues and how the amount is affected by the time and manner of payment applicable to non-members.[2] In short, there is incorporation by reference.

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[1] Consistent with the holding in Part II of the majority's opinion, it is obvious that the finance charge is "uniform". It is certainly "periodic" also because it is payable monthly on the unpaid balance of the annual dues.

[2] The majority implicitly concedes as much in Part II of its opinion because the formula for computing dues is contained in

Although ALPA's constitution and bylaws provide that annual dues and the equivalent agency shop service charge are payable annually in advance, there are two optional methods of payment: (1) the check-off where no interest is charged or finance charge imposed,[3] and (2) the ALPA finance plan where interest of 1% per month on the unpaid balance is charged. It must be stressed that these two options are precisely that—options. No pilot is required to employ either, although there may be a strong economic compulsion to authorize a check-off. The lack of compulsion to use the ALPA finance plan where the finance charge is imposed robs the imposition of the charge of a large measure of the nature of a penalty. Simply stated, a penalty is usually suffered involuntarily, as a result of a default by the person upon whom the penalty is imposed; here, the alleged penalty is an obligation voluntarily assumed by the pilot electing this form of payment.

There are other factors which persuade me that the finance charge is not a penalty. When ALPA permits a pilot to defer payment of his annual dues or service charge, ALPA is deprived of the current use of the monies due it, and it is not unreasonable that it should be compensated for the use of its money so long as the rate of compensation is not disproportionate to that prevailing in the marketplace. I do not think that the current finance charge is disproportionate to the current market rate. Additionally, when it defers the payment of dues and there is no check-off, ALPA has other expenses such as billing and

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ALPA's constitution and bylaws and not in the collective bargaining agreements. I respectfully suggest a glaring inconsistency on the part of the majority when it looks to ALPA's internal documents to find out the amount of the service charge but turns a blind eye to the documents with reference to the amount as affected by the time and manner of payment.

[3] As the majority points out in n.2 of its opinion, the check-off may be authorized by non-members of ALPA as well as members.

record keeping as amounts are paid, and it is not unreasonable that it make a charge to compensate itself for these operational costs. Of course, some of the same operational costs, including the use of its money, are sustained by ALPA when it permits a pilot to use a check-off without imposing a finance charge. But, when a pilot authorizes a check-off, it is obvious that ALPA's credit risk is markedly reduced. ALPA can look to the credit of the employer rather than that of the employee to insure future payment. It is assured that as a pilot earns compensation the proper percentage will be paid to ALPA. With this reduction of risk, I do not think it unreasonable for ALPA to fail to impose a finance charge on this kind of deferred payment. Certainly the fact that ALPA draws a distinction between the two options and requires a finance charge on one but not the other does not, in my view, convert the finance charge into a penalty.

Since I am persuaded that the finance charge is not in violation of the statute when it is imposed for ALPA finance-deferred payments, I would not consider ALPA's contention that plaintiffs have failed to exhaust their contractual or statutory remedies before litigating the validity of the charge. I would affirm the judgment of the district court in its entirety.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 78-128-A

HAROLD E. BAGNALL, *et al., Plaintiffs,*

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.,*
Defendants.

Civil Action No. 78-228-A

RICHARD L. BERRY, *et al., Plaintiffs,*

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.,*
Defendants.

ORAL OPINION OF JUDGE ALBERT V. BRYAN, JR., DELIVERED FROM THE BENCH ON JULY 14, 1978

THE COURT: I see no reason to delay ruling on the matter. I feel like I know as much about it now as I'll know with further deliberation on it.

The facts are not in dispute, at least in so far as the first claim, first two claims are concerned. Those facts seem to be adequately and properly stated in ALPA's memorandum on pages 1, 2 and those parts of 3 except for the last paragraph, and I adopt the factual statements set forth on pages 1, 2 and page 3 except for the last paragraph, because I think the matter is appropriate for summary judgment or at least partial summary judgment.

The three options which are given to members and nonmembers treat members and nonmembers uniformly. I

think that's all that is required, and that is what is meant by uniformity of treatment, and that uniformity of treatment is to me properly imposed upon a nonmember as well as a member—an obligation to pay the 1.35 percent of his gross pay to the union.

I don't think that uniformity requires that the nonmember higher-paid employee need pay no more than the lowest-paid member of the union. Otherwise, the higher-paid nonunion members are, in fact, getting a free ride. The purpose of the allowance of agency shop in these sort of—in this industry, was to keep the nonmember from getting a free ride from the efforts of the union and the contributions of its members.

Nor do the other options treat the nonmember nonuniformly. The finance charge is just that. It is applied indiscriminately to the member and nonmember. It is an option which the nonmember as well as the member has. And I think it is perfectly permissible so long as the finance charge is not being asserted against the nonmember in a way that is discriminatory or in a way that is designed, or may have as its effect, coercion to join the union. It is a difference in charge for an employee who desires to make his union payment or his membership payment or his obligation in a different way that the check-off, or the lump-sum payment at the end of the year. It is not invalid and certainly cannot be claimed as invalid by any assertion made by these plaintiffs.

Nor do I think the collective bargaining agreement is deficient in failing to provide for adequate notification to its members of their rights to dissent or their obligation—I mean the manner in which they may dissent from the use of their funds for purposes other than collective bargaining. I do not think that there is anything improper in a unitary structure of dues assessments and obligations to pay, regardless of which particular employer is involved. And certainly here—the first and second claims—

certainly here there is no plaintiff who can claim injury from any duty—failure of any duty—of fair representation.

I think, therefore, for these reasons, the defendants are entitled to partial summary judgment on the first and second claims. Insofar as the third claim is concerned, there apparently is a dispute as to the amount to which—the amount of rebate to which each plaintiff may be entitled. I'm not so sure that's a material issue, but it may be. I cannot say from these pleadings that it isn't, although counsel for the plaintiff seems to indicate this is a minor issue and not the purpose of his lawsuit.

But in view of the defendant's—or the defendant ALPA's concession that it is obligated to pay to a dissenting or a dissident nonmember a rebate in the amount of any sums from his payments which were allocated to noncollective bargaining purposes, and perhaps political purposes, I don't think any injunction is necessary. It may well be that a machinery will have to be set up for the determination of such sums where a dissident voices his objection. Certainly, the Court does not want to sit as a Small Claims Court for the adjudication of these rebates. But the case is here on a substantial question, not just on those rebates, and therefore it can remain here for the adjudication of those—of the amounts of those rebates if, after the counsel confer, those rebates are of sufficient size to warrant the obvious expensive talent that's here today.

Further litigation—estimates of the amount of it varies substantially, but even the top limit to 12 plaintiffs probably wouldn't cover the cost of today's counsel fees. Therefore, I would wonder whether, since as far as my ruling is concerned that is the only issue to be determined, whether counsel want to pursue it—that issue—or whether they want to get on to a further review of this on the more

important issues. But, insofar as this ruling is concerned—in this court—partial summary judgment will be entered in favor of the plaintiff [*sic*] to the extent I've outlined. Leaving, subject to counselor's discussion of this, the issue as to the amount, if any, of any rebate due to these plaintiffs.

Mr. Green, I'll ask you to prepare an order in accordance with these rulings. Present it after submission to counsel for the other side's approval as to form.

I think this renders unnecessary at this time any ruling on motion to compel. I don't know if a motion to compel is necessary for a determination of these rebates. If it is, I will be glad to consider it at a later time.

I think counsel might want to take another look at that motion when they prepare an order on the ruling on the motion for summary judgment.

The motion to consolidate for all purposes is granted.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 78-128-A

HAROLD E. BAGNALL, *et al.*, *Plaintiffs*,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Defendant.

MEMORANDUM OF DEFENDANT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

This is an action [1] by eleven airline pilots seeking monetary and injunctive relief pursuant to the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* ("the RLA"), against their respective employers—Trans World Airlines, Inc. ("TWA)" and Northwest Airlines, Inc. ("NWA")—and against the Air Line Pilots Association, International ("ALPA"), the labor organization duly designated as their exclusive collective bargaining representative under the RLA.

ALPA has negotiated successive collective bargaining agreements with TWA and NWA, governing in detail the wages, hours and working conditions of all TWA and NWA pilots, whether members of ALPA or not. The agreements presently in effect require all TWA and NWA pilots either to become and remain ALPA members, or, in lieu thereof, to pay an agency shop service charge equivalent to the dues normally required of members. Complaint, para. 8.

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[1] The similar memorandum filed in No. 78-228-A is not reproduced in this appendix.

Both agreements also contain a special administrative procedure allowing for independent and impartial review of certain disputes which may arise thereunder. Thus, both agreements provide that any employee who is threatened with discharge because of an alleged delinquency in the payment of his dues or service charges may submit a request for review. Such a timely request entitles the employee, eventually, to a hearing before a neutral arbitrator selected by the National Mediation Board. During the pendency of such review, the employee's discharge may not be implemented. The designated arbitrator may consider any claim that the agreement has not been "properly interpreted or applied", and the arbitrator's decision in such claims is "final and binding on all parties to the dispute". (Northwest agreement, Sections (c), (d), (e) and (f), attached to the Complaint as plaintiffs' Exhibit A; TWA agreement, Section 3-B (D) and (E), attached to the Complaint as plaintiffs' Exhibit B.).

ALPA's Constitution and By-Laws provide that annual dues are due and payable by January 1 of each year, and are imposed at the rate of 1.35% upon each covered employee's estimated airline income for the calendar year. (A copy of Article IX of the ALPA Constitution and By-Laws is attached hereto as ALPA's Exhibit A). In the event that there is a variance between an employee's actual and estimated income in any year, ALPA's Treasurer conducts an annual verification and makes the appropriate adjustment.

In lieu of paying dues on an annual basis, ALPA's Constitution also permits employees to make payments on a monthly basis "by dues checkoff . . . when available through his employment agreement" (Art. IX, Section 3D). Both of the agreements involved in this case contain such dues checkoff provisions, authorizing automatic withholding from payroll checks by the carrier and periodic transfer to ALPA. In addition, the Constitution allows ALPA members to pay dues to ALPA on a monthly basis "under

an Association-sponsored finance plan." (*Id.*) The finance plan provides for a monthly finance charge "at a rate no greater than one percent (1%) per month based on the unpaid balance. (Art. IX, Sect. 9).

ALPA's finance plan is a recent development. Prior to 1970, some members borrowed from a commercial bank in order to pay their annual dues on time, and repaid the loan to the bank, with a finance charge, over the course of the year. In exchange for an ALPA guarantee of repayment on any loan defaults, the bank offered a favorable finance charge rate on such dues loans. When ALPA eventually acquired a computer and developed an appropriate internal billing system, it became feasible for the union to eliminate the bank, and to handle the financing and collection of dues itself.

For this reason, an ALPA study committee recommended, and the ALPA Board of Directors adopted, a 1970 revision in the Constitution and By-Laws which eliminated the bank arrangement and brought the financing "into an in-house operation using our new computer . . ." (Affidavit of Wallace W. Anderson, and attached transcript of a portion of the ALPA Board of Directors Convention, November 5, 1970, pp. 2225-2227). It was emphasized that there would be "no increase in dues and there will be no increase in the service charge or the finance plan charge that those of you who are presently on the [bank's] monthly payment plan will be paying." (*Id.*)

Thus, ALPA's dues structure affords each member a series of options: (1) pay dues annually at the rate of 1.35% of income; (2) pay dues on a monthly basis through automatic payroll deductions, at the same rate; or (3) pay dues monthly under the ALPA finance plan, which includes an additional 1% per month finance charge on the unpaid balance. Non-members required to pay agency shop service charges are uniformly granted the same three options. (Affidavit of John J. Magee, ALPA Treasurer).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 78-128-A

HAROLD E. BAGNALL, *et al., Plaintiffs,*

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al., Defendants.*

Civil Action No. 78-228-A

RICHARD L. BERRY, *et al., Plaintiffs,*

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al., Defendants.*

FINAL ORDER

This cause having come before the Court and the Court having considered the plaintiffs' motion to consolidate; the defendants' motions to dismiss or, in the alternative, for summary judgment in both cases; the plaintiffs' opposition thereto and cross-motion for partial summary judgment in both cases; the memoranda of law and exhibits and affidavits submitted by the parties; the oral argument of counsel for the parties, in open court and at the pretrial conference held in chambers on July 20, 1978; and all of the papers and pleadings on file herein; it is by the Court this 25th day of September 1978,

ORDERED that plaintiffs' Motion To Amend the Complaint in Civil Action No. 78-128-A be, and the same hereby is, granted, and it is further

ORDERED that Civil Action No. 78-128-A and Civil Action No. 78-228-A be, and they hereby are, consolidated for all purposes, and it is further

ORDERED that defendants' motions for summary judgment be, and they hereby are, granted:

Claims I and II of both complaints are hereby dismissed in their entirety as to all defendants for failure to state a claim upon which relief can be granted.

Claim III of both complaints, insofar as it seeks relief by virtue of any alleged deficiencies in the terms of the current collective bargaining agreements to which defendants are parties, is also dismissed as to all defendants for failure to state a claim upon which relief can be granted. Claim III also presents a request for monetary relief under *Machinists* v. *Street*, 367 U.S. 740 (1961). However, assuming that defendant union makes expenditures which the *Street* case requires to be rebated in part, this aspect of Claim III is moot as to all defendants since the Union has, after service of the instant complaint, paid or credited to plaintiffs' accounts the amounts specified below, and the plaintiffs do not contest the propriety of those amounts:

Harold E. Bagnall	$3.48	R. D. Longwish	$3.70
Richard L. Berry	2.46	Robert G. Maiers	5.62
Donald Bauer	2.89	Floyd E. Murray	4.29
Kraig A. Hilbink	2.63	William W. Niendorff	4.40
Roy A. C. Hill	5.25	Allan G. Sawatzky	2.46
R. T. Kirchoff	5.22	Clyde B. Smith	3.74
Thomas D. Klemens	3.92	N. J. Vasilaros	3.40
David LeBoutillier	2.59		

And it is further ORDERED that plaintiffs' cross-motions for partial summary judgment in both cases be, and they hereby are, denied in all respects and it is further

ORDERED that defendant union's motion to compel answers to interrogatories be, and it hereby is, denied as moot.

By the Court:

/s/ ALBERT V. BRYAN, JR.
Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1773

HAROLD E. BAGNALL, DONALD BAUER, KRAIG A. HILBINK, ROY A. C. HILL, R. T. KIRCHOFF, THOMAS D. KLEMENS, DAVID LEBOUTILLIER, R. D. LONGWISH, ROBERT G. MAIERS, WILLIAM W. NEINDORFF, N. J. VASILAROS, RICHARD L. BERRY, ALLAN G. SAWATZKY, CLYDE B. SMITH, *Appellants,*

v.

AIR LINE PILOTS ASSOCIATION, INT'L, TRANS WORLD AIRLINES, INC., NORTHWEST AIRLINES, INC., BRANIFF INTERNATIONAL CORP., *Appellees.*

Appeal from the United States District Court for the Eastern District of Virginia

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part. The case is reversed in part and remanded to the U. S. District Court for the Eastern District of Virginia, at Alexandria, for further proceedings consistent with the opinion of this Court filed herewith. Each side will bear its own costs.

FILED: JUNE 30, 1980.
U.S. COURT OF APPEALS, FOURTH CIRCUIT

A True Copy, Teste:
William K. Slate, II, Clerk
/s/ By TERRY D. COX

7/11/80: Petition for rehearing filed.
9/3 /80: Order denying petition for rehearing filed.

/s/ WILLIAM K. SLATE, II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1773

HAROLD E. BAGNALL, et al,
Appellants

v.

AIR LINE PILOTS ASSOCIATION, INT'L, et al,
Appellees

ORDER

There being no request for a poll of the court on the petition for rehearing en banc,

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Haynsworth and Judge Winter.

/s/ H. E. WIDENER

For the Court

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1773

HAROLD E. BAGNALL, DONALD BAUER, KRAIG A. HILBINK, ROY A. C. HILL, R. T. KIRCHOFF, THOMAS D. KLEMENS, DAVID LEBOUTILLIER, R. D. LONGWISH, ROBERT G. MAIERS, WILLIAM W. NEINDORFF, N. J. VASILAROS, RICHARD L. BERRY, ALLAN G. SAWATZKY, CLYDE B. SMITH, *Appellants,*

v.

AIR LINE PILOTS ASSOCIATION, INT'L, TRANS WORLD AIRLINES, INC., NORTHWEST AIRLINES, INC., BRANIFF INTERNATIONAL CORP., *Appellees.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria
Albert V. Bryan, Jr., District Judge

Upon consideration of a motion of the appellees, by counsel, for stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court—by Direction.

/s/ WILLIAM K. SLATE, II
Clerk

No. 80-861

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HAROLD E. BAGNALL, et al.,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

GARY GREEN
1625 Massachusetts Ave.N.W.
Washington, D. C.20036
(202) 797-4096
Counsel for Respondent
Air Line Pilots Ass'n,
International

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-861

HAROLD E. BAGNALL, et al.,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

STATEMENT OF THE CASE

Respondent Air Line Pilots Association ("ALPA") accepts Petitioners' statement of the case with the following modifications.

Petitioners have all chosen to remain nonmembers of ALPA and, accordingly, are required by the appli-

cable agreements to pay agency shop service charges as a condition of employment. In virtually identical federal court complaints, petitioners alleged that the imposition of dues and service charges on a percentage-of-income basis produces higher union payments for higher-earning employees and lower union payments for lower-earning employees. Such an arrangement, they contended, is "per se violative of Section 2, Eleventh, because such charges are not uniform . . . [and] burdens them with a disproportionate share of the costs of collective bargaining." (A. 10, 29).[1/]

Petitioners also asserted in their complaint that their service charges had been expended by ALPA, in part, for unidentified purposes "other than negotiating and administering collective bargaining agreements . . ." (A. 10, 29). Injunctive and other

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1/ References designated "A." are to the pages of the Appendix in the court of appeals.

relief was sought by reliance upon the doctrine of International Association of Machinists v. Street, 367 U.S. 740 (1961).[2/]

The district court concluded that the complaints failed to state a claim for which relief could be granted. As Judge Bryan stated in his oral opinion, a union's imposition of financial obligations by reference to a fixed percentage of earnings "treat[s] members and nonmembers uniformly" (Pet. 18a). With respect to the claim based upon Street, the district court found that the dispute was moot. After service of the instant complaints, in which petitioners had first protested about "political" expenditures, ALPA had paid or credited to their accounts specified amounts in satisfaction of any potential obligation,

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2/ In Street, supra, the Court concluded that the Congressional approval for compulsory union support arrangements provided by Section 2, Eleventh, contemplated only the sharing of the costs of collective bargaining and did not authorize compulsory support of union expenditures for "political activities", such as advancing political programs or supporting candidates for public office. Accordingly, Street held that employees are entitled to a proportional rebate of exacted funds if a union makes expenditures, over their objection, for "political" purposes not germane to collective bargaining.

and the petitioners did not dispute the propriety of the amounts paid (Pet. 20a-21a, 26a).[3/]

The court of appeals affirmed. Membership dues based upon a percentage of earnings do not lack the "uniformity" required by §2, Eleventh, the court of appeals held.

> "First, we note that the statute prescribes 'uniformity' and not 'equality'. In essence, plaintiffs are arguing that the cost of operating the union must be borne equally on a per capita basis. But this is not the law . . . Considering either his economic ability to pay or the benefits he realizes from effective representation, a pilot earning greater income has an advantage over a pilot earning less; there are reasons why he should or could pay more. There is uniformity in the basis of computing dues and there is lack of any indication of discrimination." (Pet. 5a).

The court of appeals also noted that there was no claim that ALPA had adopted the percentage formula for discriminatory purposes, and that its view of "uniformity" was supported by both agency and court decisions dealing with the uniformity test in §8(a)

3/ Hence, contrary to petitioners' assertion (Pet. 4), no court below found that ALPA spent any exacted funds for "political" purposes, and no such finding was required.

(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3).

With respect to petitioners' claim based upon Street, the court of appeals agreed that it was moot, because the parties had settled the dispute in the district court (Pet. 2a, n.1).

ARGUMENT

The decision of the court of appeals addressed by this petition is clearly correct, and there is no conflict of decisions or other basis warranting further review.

The terms, structure and legislative history of §2, Eleventh, all confirm the propriety of the court of appeals' determination that unions may impose dues based upon a percentage of employee earnings. When Congress enacted §2, Eleventh, in 1951, its purposes were "clearly revealed", Pennsylvania Railroad v. Rychlik, 352 U.S. 480, 489 (1957): to permit railroad and airline unions to require all represented employees -- whether union members or

or not -- to provide financial support for the work of collective bargaining. Rychlik, supra; Railway Employees Dept. v. Hanson, 351 U.S. 225, 231 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740, 750-764 (1961). Apart from requiring unions to treat all represented employees alike -- a condition which ALPA's approach clearly satisfies -- Congress made no effort to regulate the manner by which unions might calculate dues.[4/]

Advocates of the 1951 amendment, the legislative history shows, repeatedly emphasized that their proposal was not aimed at interfering with any employees' job rights for any reason other than his refusal to pay the union's usual financial obligations. See, e.g., Hearings on H.R. 7789 before the

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4/ Indeed, even when Congress did later decide to regulate directly the relations between unions and their members, it did so in terms which, again, did not prohibit exactions based upon earnings. In the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401, et seq., Congress enacted the first federal regulation of internal union affairs but left unions free to impose assessments and dues, without limitation as to mode of calculation, so long as appropriate democratic procedures are employed. 29 U.S.C. §411.
Detroit Council of Painters No. 16 v. Painters Local 127, 415 F.2d 1121 (9th Cir. 1969), cert. den., 397 U.S. 972 (1970).

Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 81st Congress, 2d Session, at pp. 11, 72-73, 77, 246-247; Senate Hearings on S.3295, 81st Congress, 2d Session, p. 23. When some legislators expressed concern that compulsory membership provisions might serve as a device to punish employees who disagreed with the union's policies or leadership, (House Hearings, pp. 19-20, 115, 142; Senate Hearings, pp. 167-169, 320) the original bill was revised to emphasize its limited nature: i.e., to compel mandatory financial support for the union's bargaining functions, but not to expose individual employees to reprisal because of union disfavor. House Hearings, pp. 246-247. The "uniformity" clause was part of this revision.[5/]

5/ As one informed commentator put it,

> "This limitation was intended to prevent a union from using control over its members' jobs for such purposes as punishing the exercise of free speech, engaging in political activities distasteful to the union, or testifying against the union." Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, 624 (Feb. 1959).

The Senate Report further confirms that the uniformity provision was not intended to regulate the method by which dues are calculated, but only to protect employees against job loss when they have tendered the customary financial requirement. Senate Report No. 2262, 81st Cong., 2nd Sess., p. 2. Moreover, the legislative history shows that Congress was well aware that railroad unions, in 1951, often imposed financial support obligations in terms which did not produce identical bills for all employees. The union's chief spokesman in the Congressional hearings explicitly described the dues requirement set out in the constitution of his own international union: this requirement set only a minimum and allowed each local to set its own varying charges. House Hearings, p. 262. That was, indeed, the prevailing practice in the industry, as Congress well knew, since it received and reviewed all pertinent union constitutions during its deliberations. House Hearings, pp. 89-90, 115-116, 119; Senate Hearings, p. 35. No objection was raised to the practice.

Hence, when Congress enacted §2, Eleventh, it did so without a trace of a suggestion that the uniformity requirement would require all employees to pay identical amounts to the union; the uniformity requirement simply assures that employees will be subjected only to the union's normal requirements. As the court of appeals stated, ". . . the statute prescribes 'uniformity' and not 'equality.'" (Pet. 5a).[6/] No court has held otherwise.

Nor does the court of appeals' decision raise any novel or troublesome issues of federal labor policy. The imposition of dues based upon a percentage of income has no greater tendency than fixed

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6/ The Congressional choice of terminology is consistent with its intended objectives. In the realm of taxation, "uniformity" does not mean "identity". The fact that higher-earning taxpayers pay a larger amount of taxes does not destroy the uniformity of the federal income tax. Brushaber v. Union Pacific R.R., 240 U.S. 1, 24 (1916). Nor does the uniformity requirement of the U.S. Constitution prohibit levies which result in varying tax bills. Article I, Section 8 of the Constitution (" . . . Duties, Imposts and Excises shall be uniform throughout the United States.") places no obstacle in the way of progressive taxation. Knowlton v. Moore, 178 U.S. 41 (1900). And see Fernandez v. Wiener, 326 U.S. 340, 359 (1945).

amount dues to encourage or discourage union membership or activity. Under either dues approach, employees are equally free "to join unions, be good, bad, or indifferent members, or abstain from joining . . .", Radio Officers Union v. NLRB, 347 U.S. 17, 40 (1954), without altering their financial obligations to the union. Hence, the pertinent underlying federal policy, reflected in both the Railway Labor Act and the National Labor Relations Act -- i.e., "to insulate employees' jobs from their organization rights" (Id.) -- is fully preserved under either approach. 7/

Where unions have devised dues or fee schedules which might penalize employees for exercising statutory rights, or for disobeying union policy rules, the federal courts and the Labor Board have consistently

7/ As the court of appeals noted, its interpretation of §2, Eleventh, is confirmed by all of the relevant decisions in cases arising under the comparable provision of the National Labor Relations Act. Schwartz v. Associated Musicians, Local 802, 340 F.2d 228 (2d Cir. 1964); Stage Employees & Motion Picture Operators Union, 140 NLRB 759 (1963); Aluminum Workers Trade Council, 185 NLRB 69, 70 (1970).

intervened to determine whether the union has breached the separation between membership activity and employment rights.[8] But in the instant case, as the court of appeals observed, "there is no claim that ALPA adopted the percentage formula for discriminatory purposes" (Pet. 5a) and no explanation of how the formula could have any discriminatory effects.

Petitioners fail to identify any important question of federal law which has not been, but should be, settled by this Court. Thus, petitioners apparently concede the legality of a dues structure based on percentage of income, and complain here only about the fact that they, as nonmembers, are compelled to abide by its terms:

> "No one questions the right of ALPA to structure its dues in this fashion if the voluntary union members agree to do so. Rather, the first

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8/ NLRB v. Electric Auto-Lite Co., 196 F.2d 300 (6th Cir. 1952), cert. den., 344 U.S. 823; NLRB v. Leece-Neville Co., 330 F.2d 242 (6th Cir. 1964); Ferro Stamping & Mfg. Co., 93 NLRB 1459 (1951); Local 153, Int'l Union, 99 NLRB 1419 (1952); Food Machinery & Chemical Corp., 99 NLRB 1430 (1952); Brewery Workers, Local 102, 116 NLRB 178 (1956).

> question presented is whether section 2, Eleventh (a) permits a structure like that above to be imposed upon those who elect, as is their right, not to join and become a member . . ." (Pet. 5).

But this is hardly an unsettled issue.

In NLRB v. General Motors Corp., 373 U.S. 734 (1963), the Court squarely upheld the legality of the agency shop under §8(a)(3) of the NLRA and ruled that unions could compel nonmembers to pay "sums equal to the initiation fee and regular monthly dues paid by the union members."[9/] Here, as in General Motors, the employees enjoy the option of joining the union or refusing to join; and in both cases the refusal to join subjects them only to the requirement of paying the union a sum equal to the union's regular fees and dues required of members. Thus, if ALPA is entitled to calculate its members' dues by reference to their earnings, as petitioners seem to concede, General Motors has already authoritatively disposed

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9/ Petitioners agree (Pet. 5) that an agency shop arrangement is subject to the same analysis under the Railway Labor Act. See Brotherhood of Railway & Steamship Clerks v. Allen, 373 U.S. 113, n. 2 (1963).

of the question they would raise here.[10/]

Petitioners find a "constitutional" issue (Pet. 7) in that aspect of the decision below which dealt with their claims for partial rebates pursuant to International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). But they fail here to articulate what that issue might be. That alone warrants denial of the petition. Rule 21(5), Rules of the Supreme Court of the United States, effective June 30, 1980.

In any event, the proceedings below make it clear that no issue, constitutional or otherwise, is

10/ The rationale of General Motors — namely, that Congressional approval of the union shop also extends to less severe union security arrangements — naturally operates to privilege such arrangements regardless of whether employees all pay an identical amount of dues or all pay an identical percentage of their earnings; in both situations, the "abuses of compulsory unionism" are eliminated yet "all employees could be required to pay their way". 373 U.S. at 740-41. For the same reason, the Court found it unnecessary to inquire, in General Motors, whether or not the union maintained different classifications or types of membership. Hence, petitioners' assertion that ALPA maintains "but a single type and category of membership" (Pet. 7) fails either to distinguish General Motors, or to identify any unsettled questions.

presented by the claims based upon Street. As shown above, when ALPA was served with the complaints containing allegations that it had expended union funds for purposes beyond the limitations imposed in Street, it paid the complaining employees specified amounts in satisfaction of any obligation stemming from Street;[11/] and the fact that these employees accepted the partial rebates, without dispute over the propriety of the amounts, was embodied in the district court's final order. Pet. 26a.

As a result, the district court correctly deemed the Street claims moot (Id.) and the court of appeals refused to consider the pertinent complaint allegations (Pet. 2a). Since the dissenting employees have already been repaid that pro rata portion of their compulsory union obligations which might arguably have been spent for "political" purposes,

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11/ ALPA did not agree that it had made any "political" expenditures, but it offered, and the employees accepted, sums calculated to satisfy the Street obligation if it applied.

there is no issue at all posed by this aspect of the case, let alone an issue warranting review by this Court.

Petitioners suggest otherwise, arguing that nonmembers, once they object to "political" expenditures by the union,

> "cannot constitutionally be required to pay more than the lowest paid member pays. Otherwise, the nonmember would be required to subsidize costs which should be borne by the members in violation of . . . Street . . ." (Pet. 12).

Contrary to petitioners' assertion, Street does not purport to restrict nonmembers' obligations to the level paid by "the lowest paid member". Under Street, the union must excuse all dissenters from support of political causes, but it remains entitled to ". . . financial support . . . relate[d] . . . to the work of the union in the realm of collective bargaining." 367 U.S. at 763.

Since petitioners have already received rebates for any arguably "political" expenditures, the only remaining costs are necessarily those in the "realm of collective bargaining". Street and its progeny

expressly compel such dissenting employees to continue sharing in the support of this remaining burden, Id. at 771; Allen, supra, 373 U.S. at 119-120; Abood v. Detroit Board of Education, 431 U.S. 209, 220-23, 237-240 (1977), and simply leave unaffected the union's authority to select any uniform and non-discriminatory method for its allocation among represented employees.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari in No. 80-861 should be denied.

Respectfully submitted,

GARY GREEN
Counsel for Respondent
Air Line Pilots Association,
International
1625 Massachusetts Ave., N.W.
Washington, D. C. 20036
(202) 797-4096

see 8.0

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